Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF PETITIONER HOLLYWOOD HAT CO.

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JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions, filed on behalf of six petitioners, praying that a Decision and Order of the National Labor Relations Board (reported at 162 NLRB No. 41)[1] be reviewed

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[1]References to the documents reproduced in "Transcript of Record, Vol. I" are made by citation to "Vol. I" and to the page number where the documents appear. References to the steno-

and set aside. As to each of the three petitions the Board has filed a cross petition for enforcement of its order. All six petitioners are engaged in business within this judicial circuit, in the state of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioners are aggrieved by such final order of the respondent cross petitioner (Board) and, therefore, this Court has jurisdiction under § 10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 USC § 141 *et seq.* (1958)][2] The Board, in its cross petition and answers to the three petitions, has admitted petitioners' jurisdictional allegations.

INTRODUCTION.

Various of the Licensees at the K-Mart Commerce store, and K-Mart itself, have also petitioned for review and will file separate and independent briefs challenging the Board's conclusion with respect to the appropriate unit and to other matters presented in the underlying representation case. Hollywood Hat Co. joins with and adopts the positions taken by other Petitioners in the consolidated cases, raising and discussing the points above mentioned. In this brief Hollywood Hat Co. shall discuss only a single point, separate from those discussed in the briefs of other Petitions.

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graphic transcript of the unfair labor practice hearing reproduced in "Transcript of Record, Vol. II" and to the stenogaphic transcript of the representation hearing, reproduced in "Transcript of Record, Vol. II-A" are made by citation to the appropriate volume and transcript page number. References to all undesignated exhibits are made by citation to Vol. III and to the appropriate exhibit number.

[2]The pertinent statutory provisions are reprinted, *infra,* at Appendix B.

ARGUMENT.

A. The Board's Certification Contained an Incorrect Unit Description; Subsequent Actions by the Board, General Counsel and Union Have Undermined Whatever Validity There May Have Been to Such Certification; in Light of Such Facts, a Refusal to Bargain Charge Cannot Be Sustained.

The evidence relied upon by K-Mart and the Licensees before the Trial Examiner and the Board in defense of the refusal to bargain charge (case No. 21-RC-9309) raised serious questions as to whether the provisions of the Act had been complied with or were being properly enforced. That evidence demonstrates that the Board committed error in certifying a unit which was erroneous, improper nd incomplete; that the General Counsel committed error in issuing the instant complaint based upon the above certification, and that the Union compounded each error by founding its demand letters and unfair labor practice charges upon such certification.

The Board concluded that these claims of procedural irregularities were "without substance" and found violations of Section 8(a)(5) and (1) of the Act (refusal to bargain) [Vol. I, p. 327].

Yet the weight of evidence is that the Union, the General Counsel and the Board itself have, since the outset of the unfair labor practice case, committed such repeated and substantial errors in their confused and contradictory attempts to enforce the provisions of the Act, as to render baseless the refusal to bargain finding herein.

1. **The Union Charge and Demands for Recognition Were Based on a Defective, Equivocal and Contradictory Certification and Were, Therefore, Improper.**

One of the so-called "joint employees", herein, Besco Enterprises, Inc., was named in the complaint below [Vol. III, G.C. Ex. 1(e)] even though it had admittedly not engaged in business at the K-Mart Commerce store since March 20, 1965, a date prior to the election, which was held on April 7, 1965 [Vol. III, G.C. Ex. 10]. This fact was clearly pointed out by the reply of Besco to the Union's demand for bargaining in which it refused to extend recognition because it had not, since March 30, had any employees in the Commerce store [Vol. III, G.C. Ex. 46(b)]. The same was conceded as true by the General Counsel in the hearing below [Vol. II, Tr. p. 23, lines 16-24].

Moreover, after the election of April 7, 1965, but prior to the Board's certification on September 9, 1965 [Vol. III, G.C. Ex. 40] a new licensee, Zale Jewelry, commenced operations at the Commerce Store. Yet the General Counsel's complaint did not name Zale as a party nor did the Union make demand upon this licensee; this despite the fact that Zale employees fell clearly within the Board's designation of those employees within the appropriate bargaining unit.

A brief history of the Board's vacillation with respect to the unit description herein serves to place this in proper focus. Originally the Regional Director, in the representation case, found the appropriate unit to be "all regular full-time and part-time employees employed at K-Mart's Commerce, California, store, includ-

ing selling, nonselling, and office clerical employees, *and employees of licensees . . .*" [Vol. III, G.C. Ex. 5(a), p. 8]. (Emphasis added).

In contradistinction, the Trial Examiner in the unfair labor practice proceeding, found appropriate a unit which specifically described each licensee by name, including Besco but excluding Zale [Vol. I, p. 309].

On review of the Trial Examiner's Decision the Board modified the latter unit description, noting that neither the Regional Director's Decision [Vol. III, G.C Ex. 5(a)] nor the Board's certification [Vol. III, G.C. Ex. 40] mentioned licenses by name and deleted those names in favor of the prior generic description, "employees of licensees." [Vol. I, p. 326, n. 5].

Thus, although the approved unit embraces *all licensees* and Zale is indisputably such a licensee, at no time did the Union make demand upon Zale to bargain as a joint-employer, nor did the General Counsel request that Zale be included as a party to the unfair labor practice proceeding.

To further confound the issue a demand letter was served on Besco by the Union [Vol. III, G.C. Ex. 46(a)] and its original and first amended unfair labor practice charges named Besco as a party [Vol. III, G.C. Ex. 1(a); 1(c)] even though it knew full well that Besco had ceased doing business at Commerce. To top this off, the General Counsel then issued its complaint charging Besco, together with other "joint-employers" in the unit, with an unlawful refusal to bargain [Vol. III, G.C. Ex. 1(e)].

In the light of this evidence, the Board's conclusion that the certification was clear and the Union demands appropriate, is totally insupportable.

Firstly, the Board claimed that it was never notified either that Besco had ceased operations or that Zale had commenced operations at Commerce [Vol. I, pp. 325-326]. This is patently untrue, as evidenced by the complaint of the Board's General Counsel which specifically alleged: "Zale Jewelry Service Inc., dba Zale Jewelry, herein called Zale, pursuant to a lease agreement with K-Mart, sells jewelry and cameras at the Commerce store . . . Zale operates the same department formerly operated by Besco under the same arrangements with K-Mart which Besco had with K-Mart." [Vol. III, G.C. Ex. 1(e), p. 2].

Therefore, although the Board may not have known of Zale's existence or Besco's removal at the time of the election or the certification, the Board knew that Zale was an active licensee at the time of the issuance of the complaint herein, and should not, under the circumstances, have proceeded with the charge without first clarifying the status of Zale.

Before the Trial Examiner, the General Counsel, recognizing the patent inappropriateness of Besco's inclusion in the unit, requested no order requiring Besco to bargain [Vol. II, Tr. p. 24, lines 1-4] but suggested the Trial Examiner find K-Mart and other licensees, including this Petitioner, in violation of Section 8(a)(5) of the Act, and then allow the Union to cure any defect in its demand, *post facto,* by instituting a separate and subsequent demand upon Zale with

concomitant rights to file a charge if it later refused to bargain [Vol. II, Tr. p. 25, lines 1-24].

In his Decision, the Trial Examiner went much further than even the General Counsel dared suggest. He found that Besco "had been succeeded by a new licensee, Zale," that Zale was "Besco's successor" [Vol. I, p. 308, lines 48-62] and further that ". . . Zale succeeded to the business formerly conducted by Besco. It is settled law that one who becomes a successor employer during the period of the certification is bound by that certification. Zale, as Besco's successor, was and is bound . . ." [Vol. I, p. 309, lines 7-10].

There was not a scintilla of evidence in the record to support the Trial Examiner's finding. Indeed, Zale had never even received a hearing on the issue as to whether it was bound by the certification. Consequently the finding was not (and could not have been) adopted by the Board.

The Board did not, however, consider the Trial Examiner's error to be "material"; rather, taking its cue from the General Counsel's similar suggestion, it "cured" any defect in the certification and demands, in its opinion, by not directing its order to bargain against either Besco or Zale [Vol. I, p. 326, n. 4].

The effect of the Board's decision, then, is to give rise to the complete anomaly that while the unit description includes "employees of all licensees," Zale, admittedly an active licensee, is not subject to its order and not required to bargain. The Court of Appeals for the 6th Circuit acted to prevent a similarly absurd result in *NLRB v. Schnell Tool & Die Corp.,* 359 F.

2d 39 (6th Cir. 1966). There, the Board had sought enforcement of its remedial order against two named corporations which had, subsequent to the rendition of the order, sold their interests to outside corporations. Nonetheless, the Board urged the Court to enter a decree of enforcement against the named parties contending that proceedings could later be had before the Board to determine whether the decree was enforceable against the purchaser corporations.

The Court rejected this extraordinary request as putting "the proverbial cart before the horse" and emphasized that if the Board seriously sought enforcement against the unnamed corporations, it "should institute the necessary proceedings before the Board to secure a determination that the decree is so enforceable," *prior* to its application to the Court for such enforcement.

By the same token, we submit that appropriate proceedings should have been conducted to determine whether, in fact, Zale was appropriately in the joint-employer unit (assuming such a unit is appropriate at all) before unfair labor practice proceedings were commenced. For if Zale was in fact a "joint-employer", the Union demands, which omitted Zale, were unquestionably defective.

Indeed, the Board itself has recognized merit in the foregoing argument in a companion case to the instant one, involving the K-Mart store in San Fernando, California. On June 13, 1966, in case No. 31-RC-141 (159 NLRB No. 28), the Board directed an election of all regular full-time and part-time employees of K-Mart,

Mercury and Gallenkamp employed at K-Mart's San Fernando store. . . ." Later, on June 22, 1966, the Board was administratively advised that subsequent to the hearing in that case but prior to the Board's Direction, a new licensee, Holly Stores, Inc., had begun operating in the K-Mart store in San Fernando. The Board, on its own motion, issued an order amending the Direction of the Election so as to include "all regular full-time and part-time employees of Holly Stores, Inc.

Thereafter, on June 29, 1966, counsel for Holly Stores, Inc. filed with the Board an objection to the issuance of the Board's order of June 22, 1966, "Without notice, without a hearing and without affording Holly Stores, Inc. an opportunity to be heard with respect thereto." On July 7, 1966, the Board wired the parties that in light of the objection by Holly Stores, Inc., all ballots in the election of that day were to be impounded, pending Board consideration, in a formal hearing, of the question raised by this objection.

It is important to re-emphasize that in the instant case, there has never been any evidence that Zale is a successor of Besco, as there was never any evidence that Holly Stores, Inc. was a successor of anyone else. The recognition by the Board in case No. 31-RC-141 that a licensee may not summarily be included within a unit unless and until it has had the opportunity to be heard on pertinent questions pertains to the instant case in the same manner. The Board in the instant case did what, in case No. 31-RC-141, it was inadvertently about to do—put the cart before the horse.

2. **Assuming, Arguendo, That the Board's Certification Names an Appropriate Joint Employer Unit, the Union Has Failed to Adhere to That Certification in Making Its Demands Upon the Employer.**

K-Mart and the Licensees further charged that the Union's demand for recognition was improper because it requested K-Mart to bargain alone for all the joint-employers. This interpretation of the Union's demand was not accepted by the Board which concluded that the demand could only be construed as a request for bargaining on a joint-employer basis [Vol. I, p. 327]. The preponderance of record evidence is contrary to this conclusion.

On February 24, 1965, the Regional Director issued his Decision and Direction of Election [Vol. III, G.C. Ex. 5(a)] in which he ruled that K-Mart and each of its licensees were a joint-employer of the employees in each of their respective departments. The effect of this decision was to obligate K-Mart and the licensees to bargain collectively with the union as a single employer unit. Nevertheless, subsequent to the initial Certification of Representative [Vol. III, Ex. 40], and in complete contravention of the Regional Director's Decision and the certification of the Board, the Union on September 21, 1965, proceeded to make a demand on K-Mart and K-Mart *alone,* to bargain collectively, on behalf of all employers, with the union [Vol. III, G.C. Ex. 41(a)]. That the Union felt it had met the terms of the certification in making a solo demand upon K-Mart is evidenced by the remarks of the General Counsel during the instant hearing:

> "My contentions are that the Joint Employer, the *common denominator* K-Mart, which was found to be a Joint Employer with each one of the licensees, the Union by making the demand on K-Mart, *that demand alone would satisfy any requirement that the Union had under the certification to protect its rights. It would not have even had to make a demand on any of the licensees.* That would be my position, Your Honor." [Vol. II, Tr. p. 25, lines 15-24]. (Emphasis added).

The intention to have K-Mart bargain for all of the joint-employers is further made clear in a letter dated October 19, 1965, from counsel for the Union to counsel for K-Mart. This letter attempted to "clarify" the Union's position on this matter and to re-assert its request for bargaining. It stated in part:

> "So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client (K-Mart) to bargain in the *unit found appropriate by the Board.*" [Vol. III, G.C. Ex. 48]. (Emphasis in original).

The quoted portions of this letter can only be understood to express the position that although the unit included K-Mart and all of its licensees, demand was made by the Union upon K-Mart alone to *bargain on behalf of the entire unit.* Indeed, this is precisely the General Counsel's theory, as expressed during this hearing and quoted above.

To add further complexity to an already confused situation, the Union, on October 18, 1965, a *period of more than five weeks after its initial demand upon K-*

Mart alone, directed *separate* demand letters to each of the licensees, including Besco (a second demand was *not* made upon K-Mart), requesting them to bargain with the Union?[1] [Vol. III, G.C. Exs. 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)]. Surely, K-Mart and its Licensees were justified in refusing to acquiesce in the Union's separate demands made upon each licensee (but not K-Mart) to bargain with the Union.

It is submitted that the proper procedure for such a demand, consonant with the purposes of the Act and the

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[1]This letter of demand was not the first instance in which the Union chose to ignore the Board's certification and to treat K-Mart and its licensees as separate entities. At a time subsequent to the certification the Union filed an unfair labor practice charge involving the K-Mart Westminster store (case No. 21-CA-6854), which was part of the original proceeding, together with Commerce, in which, on records stipulation to be identical, the Regional Director ruled that a joint-employer status existed between K-Mart and its licensees [Vol. III, Mercury Ex. 1; Vol. II, p. 61, lines 16-20].

This charge was amended by the Union to *exclude* K-Mart and all other licensees, except Mercury Distributing Co. [Vol. III, Mercury Ex. 2; Vol. II, p. 61, line 21, to p. 62, line 1]. As a consequence of this charge the Union and Mercury executed a settlement agreement which K-Mart and one of the other licensees were not made parties [Vol. III, G.C. Ex. 2(c), Mercury Exs. 3, 4; Vol. II, p. 62, lines 2-13]. The execution of the settlement agreement in effect segregated the joint-employer relationship into an individual employee relationship by refusing to recognize the joint-employer unit for purposes of unfair labor practices. This episode makes it all the more clear that when the Union later made its demands separately upon the various licensees it was pursuing and extending its policy of segregating and fragmentizing the unit for purposes of collective bargaining. Board precedent is to the effect that a union cannot recognize a joint-employer unit for one purpose (*i.e.,* collective bargaining) and disregard it for another purpose (*i.e.,* unfair labor practice charges). *Dayton Coal & Iron Corp.,* 101 NLRB 672, 688-689 (1952); *Dearborne Oil & Gas Corp.,* 125 NLRB 645 (1959), dissent of member Jenkins); *Zayre Corporation,* 154 NLRB 1372 (1965); *Great Scott Super Market,* 156 NLRB 592 (1966); *Rose Printing Co.,* 146 NLRB 638 (1964).

intent of the certification, was a joint letter to all of the employers within the unit advising them that they constitute one unit and requesting them to bargain with the Union jointly. Instead, the Union chose to make a totally inappropriate request of K-Mart to separate itself from the joint-employer unit and to bargain alone on behalf of each of the employers within the unit. Such a request was improper, contrary to the certification, and provided ample justification for K-Mart's refusal to bargain.

The question of the Union's conformance with the Board's certification and the correct procedure instituting collective bargaining in a joint-employer unit is one of much substance. The impropriety of the initial certification is established by the weight of evidence; equally obvious is the fact that the Union has never made clear and unequivocal demand on the unit found appropriate by the Board. At the very least, K-Mart and its Licensees were entitled to an understandable and accurate request for bargaining before they were required to accede to such a demand.

B. Conclusion.

For the reasons above cited and the reasons raised and discussed in the briefs of other Petitioners in the consolidated cases it is respectfully submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

HILL, FARRER & BURRILL,
By KYLE D. BROWN,
Attorneys for Petitioner Hollywood Hat Co.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN

APPENDIX A.

Statutes and Code Sections.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

APPENDIX B.

(Pursuant to Rule 18(f) of the Rules of Court).

1. Representation Case Exhibits (21-RC-9128, et al.)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - 1(j)	6	7	7	
Employer's (K-Mart) Exhibits*				
1	70	70	71	
2	138	138	138 – 39	
3(a)	214	215	215	
3(b)	216	216	217	
3(c)	217	218	219	
3(d)	219	220	220	
3(e)	221	222	222	
3(f)	222	223	223	
3(g)	224			

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II-A.

2. Unfair Labor Practice Case Exhibits (Case No. 21-CA-6937)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - (j)	7	7	7	
2(a) - 49	18	18	19	
K-Mart Exhibits*				
1(a) - (d)	43 – 44	44	48	
1(e) - (d)	49	49	50	
2, 3	50 – 52	52		52
4	55	55	55	
5	56	56		57 – 58
Mercury Exhibits*				
1-4	61 – 62	62	63	

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II.